In the Supreme Court of the United States.

OCTOBER TERM, 1922.

GEORGE B. KIRBY, CHARLES MCDANIELS, and United States Fidelity and Guaranty Company, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA FOR and on behalf of the Crow Tribe of Indians.

No. 126.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case involves the construction of a clause of a "grazing lease" of certain Indian lands in Montana.

The lease (R. 6–14), with the approval of the Secretary of the Interior (R. 2), was made between the superintendent of the Crow Indian School, for and on behalf of the Crow Tribe of Indians, and the plaintiffs in error Kirby and McDaniels. To secure faithful performance of their part of the contract the lessees executed a bond in favor of the United

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States with the United States Fidelity and Guaranty Company, also plaintiff in error, as surety, in the sum of $31,950. (R. 14–16.)

The lease was for a term of two years (R. 6, 7), commencing on February 1, 1916, at an annual rental of $31,950, to be paid in equal semiannual payments in advance (R. 8), for grazing an average of 9,000 head of cattle (R. 9), and contained a provision as to payment for excess grazing. (R. 9.)

On January 12, 1920, alleging that during the term of the lease the lessees had engaged in grazing for which they had not paid the rental prescribed in the lease, the United States, on behalf of the Crow Indians, filed an amended complaint (R. 2–5) against the lessees and the surety company in the District Court of the United States for the District of Montana.

By stipulation the case was tried by the court without a jury (R. 23). The court found that during the first year of the lease there had been no grazing beyond the amount paid for by the annual rental, but that during the second year excess cattle to the extent of 6,968 head had been grazed, and accordingly entered judgment for the Government for $31,356, besides interest from February 1, 1918, and costs. (R. 24–26, 55–57. See also 51–55.)

On writ of error, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment below, except as to an item of costs which is not here material. (R. 76–81.)

The writ of error from this court was then sued out.

QUESTIONS INVOLVED.

The fundamental questions in this case are the interpretation of the provision of the lease as to excess grazing and whether, in the event of excess grazing, the lessees and their surety are liable to the lessors.

ARGUMENT.

The lessees contracted to pay $4.50 per head for the average number of cattle grazed in excess of 9,000 head.

The lease provided (R. 9):

> It is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of nine thousand (9,000) head, the maximum number at any one time not to exceed eleven thousand five hundred (11,500) head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named.

The plaintiffs in error contend that the lease does not oblige them to pay for the grazing of cattle over the average of 9,000 head but not in excess of 11,500 head.

The two lower courts, however, have decided that in so far as the average number of cattle grazed in either year taken separately exceeded 9,000, the number to which the annual rental of $31,950 applied, the lessees were bound to pay $4.50 per head per year.

It may be conceded that the clause of the lease is awkwardly worded, for it refers to two maximum

numbers, the less important of which is so called and the more important of which is not so characterized. But the two lower courts, instead of quibbling over the words, considered the intention of the parties as manifested by the clause as a whole. They decided that in the expression "any excess over and above such maximum number" the maximum referred to was the permitted maximum for the year as a whole, for which the payment of $31,950 was to be made, since that maximum was the principal thing to be considered, and not the number of 11,500, since that was simply the maximum permitted at any one time, and for such time as would serve to raise the yearly average to the 9,000 figure, the temporary maximum being merely an incidental subject for consideration.

It is submitted that such an interpretation of the clause is correct.

There is nothing in the circumstances of the case to show that the parties intended that there should be any free grazing. As they carefully provided that nearly thirty-two thousand dollars per year should be paid for the privilege of grazing up to an average of 9,000 cattle and that $4.50 per head should be paid for excess grazing, it is inconceivable that either of the parties to the lease thought at the time of its execution that all cattle between the 9,000 and 11,500 limits should be grazed free of any charge.

Moreover, the written offer which Kirby and McDaniels submitted preliminary to receiving the

lease further shows the intention of the contracting parties. They wrote (R. 28):

> Minimum amount to be paid per annum in semiannual payments in advance—$31,-950.00. The number of cattle to be grazed on this district to be 9,000 head, at the rate of $3.55 per head per annum, and that any cattle grazed in this district in excess of 9,000 head shall be paid for at the same rates per head per annum.

Such an offer certainly shows that the lessees then intended to pay for all cattle grazed beyond the 9,000 limit; and this offer should be taken into consideration in construing the terms of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118; *Simpson* v. *United States*, 199 U. S. 397, 399; *Brawley* v. *United States*, 96 U. S. 168, 173, 174; *Maryland Dredging & Contracting Co.* v. *United States*, 241 U. S. 184, 188. See also Wigmore on Evidence, secs. 2465, 2462.

In determining the average number of cattle grazed, each year should be considered separately.

The plaintiffs in error contend that the lease contemplated the grazing of the equivalent of 9,000 head for two years; but both of the lower courts decided, we submit correctly, that the average for each year should be determined separately.

The contract was clearly divisible into two yearly periods. The rent was apportioned to each year (R. 6, 7), and was payable for each year, so that it is reasonable to conclude that the provision in regard

to extra payment for excess cattle applied to each year. As the District Court said (R. 53):

> Dealing with an annual crop, the parties dealt with each year complete and separate from the other.

This is an action to recover money at a specified rate which the lessees agreed to pay for permitted grazing in excess of a named average, and is not an action for a penalty.

The plaintiffs in error contend that if the lease is construed as they construe it, and "the rate of $4.50 was intended to apply to 'each and every head' in excess of 11,500 grazed upon the leased premises 'at any one time,'" such a rate is clearly a penalty, because it would apply to such excess even though the excess cattle were grazed upon the land for only one day and would be, therefore, entirely disproportionate to the value of the grazing privilege, as fixed by the contract; and they assert that under the law of Montana a penalty or liquidated damages could not be recovered in this case.

Assuming that the excess rate might have been applied to grazing in excess of 11,500 head "at any one time," there was no finding by the trial court of an excess of that nature. The finding related only to excess grazing by an average number of cattle (R. 55). Consequently the argument of the plaintiffs in error presents only hypothetical questions.

The contention that the price of $4.50 per head for the pasturing of cattle in excess of a given number is a provision for a penalty because the rent is dis-

proportionate to the value of the grazing privilege as fixed by the contract is without force in view of the fact that plaintiffs in error themselves made a charge of $5.25 per head to the Taylor's Fork Cattle Company for the same privilege upon the same land. (R. 32–33.)

The price of $4.50 per head for the excess of cattle pastured was neither liquidated damages nor a penalty for the breach of the contract. It was part of the substance of the agreement to pay a certain additional rental for cattle pastured in excess of a certain number. No breach of the contract was contemplated. The contract permitted the grazing of the cattle in excess of the number named. Provision is made in the lease itself for estimating the number of such excess and a price per head fixed, not as a penalty or as liquidated damages but in payment for the use of the lands for grazing of such excess. The argument based upon the assumption that this particular covenant provides for a penalty or liquidated damages for breach of the contract is built upon a fallacy, and has for its premise something which has no existence in fact.

As was pointed out by the Circuit Court of Appeals (R. 77, 78), the United States—

> does not sue for breach of a contract. There is no allegation in the complaint upon which either a penalty or liquidated damages can be predicated. There was in fact no breach of contract. The agreement left the defendants at liberty to pasture as many cattle on the

lands as they might see fit to place thereon, up to the limit of 11,500, but it provided that for cattle in excess of 9,000 and for the exercise of such privilege they should pay an increased rate of pasturage per head. The rate was increased doubtless on the theory that the presence of such excess cattle would result in some injury to the pasture, but that does not mean that the rate so fixed is compensation for damage. It was but payment for that which the plaintiff parted with and the defendants received.

The excess grazing was not unauthorized.

The plaintiffs in error contend that all excess grazing was unauthorized and therefore, under the statutes, illegal grazing, for which there can be no recovery in this action. But such a contention is not based upon a sound construction of the contract.

"Excess" grazing simply means grazing beyond the amount paid for by the fixed annual rental of $31,950. For the payment of that sum Kirby and McDaniels might pasture an average of 9,000 head, but not more than 11,500 head at any one time, and for cattle beyond those limits the charge of $4.50 per head was made. To say that such "excess" grazing, fully provided for by the contract, was unauthorized is absurd.

Where one of the joint tenants allowed grazing by third parties the other tenant is equally liable for the stipulated rent for that grazing.

Cattle belonging to third parties were put on the range, as permitted in the lease, after negotiations

with McDaniels, to whom Kirby had referred the representatives of one of the other parties (R. 44–45). They were put there under contracts signed by McDaniels in the names of Kirby and himself (R. 31–43); and a substantial part of the excess grazing for the second year was due to the presence of those cattle. (R. 49.)

There was some conflict in the evidence as to whether Kirby knew of, consented to or acquiesced in the grazing of the third parties (R. 48, 49); but the trial court held that the issue thus offered was immaterial (R. 49, 56); and this decision was properly upheld by the Circuit Court of Appeals (R. 79). Occupation by or under one of the two joint tenants under the lease renders both tenants liable for the rent. *Kendall* v. *Carland*, 5 Cush. 74, 80; *Goshorn* v. *Steward*, 15 W. Va. 657, 664; *Glenn* v. *Dungey*, 4 Exch. 61, 64.

The surety is liable to the extent of the bond.

As is frankly admitted in the brief for Kirby and the surety,

> If the construction of the contract adopted by the court is correct, both the principals and surety in the bond or undertaking are liable for the excess.

JAMES M. BECK,
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NOVEMBER, 1922.

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